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RIGHTS AND REMEDIES OF A LANDOWNER WHOSE PROPERTY HAS BEEN ACQUIRED BY A RAILROAD FOR A PUBLIC USE.—There are two general methods by which a railroad may acquire land. The first method, that of purchase or grant, is treated in all respects as a conveyance from one individual to another, the railroad receiving a fee simple estate and the grantor relinquishing all right thereto. This method presents no particular difficulty and is mentioned only to prevent confusion and to distinguish it from the second method—that of condemnation. By this method the railroad, under the power of eminent domain, acquires usually only an easement, the fee remaining in the original owner of the land.¹

In the first case mentioned the landowner is estopped to question the railroad's right to the land; but in the latter there are at least three instances in which the landowner may question this right: First, while condemnation proceedings are pending and before the railroad has taken actual possession of the premises; second, after the railroad has taken possession, but under void or irregular condemnation proceedings; and third, after the railroad has taken possession under valid condemnation proceedings, but is using the premises for a purpose not necessary to its operation.

Under the constitutional provision existing in most of the states, and provisions to the same effect in most condemnation statutes, that "private property shall not be taken for public use without just and adequate compensation," the payment or tender of the sum assessed is usually a condition precedent to the railroad's possession for the purpose of constructing its road.² When, therefore, a railroad company attempts to take land under a condemnation statute without first offering compensation, or for a purpose which is not necessary to the public use, the owner of such land may set up these facts in support of his right to the land, and enjoin the company from taking possession until his right to continued possession can be judicially determined.³

Where the railroad takes possession under illegal or void condemnation proceedings, it becomes a trespasser from the moment of entry, and the landowner has an election between

¹ BALDWIN, RAILROADS, p. 91. "In lands taken by proceedings *in invitum*, the corporation only acquires an easement, and when it ceases to use the land for the purposes for which it was taken, or when it ceases to be necessary for such purpose, it reverts to the original owner; but where a portion of its roadway is acquired by purchase, the fee vests in the corporation, and does not revert to the original owner upon its abandonment for railroad purposes." 1 WOOD, RAILROADS, 638. See note, 66 L. R. A. 36, as to nature of easement.

² Daniels v. Chicago & N. W. Ry. Co., 35 Iowa 129, 14 Am. Rep. 490.

³ Browning v. Camden & W. R. Co., 4 N. J. Eq. 47; Edgewood R. Co. Appeal, 79 Pa. St. 257. "If his rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under cover of law, when the law gives him no power or when it is abused, misapplied, exceeded, or not strictly pursued and the act impending would subject the party committing the damages in a court of law for a trespass, a court of equity will enjoin its commission." Buonaparte v. Camden & Amboy Co., 1 Bald. 227.

damages, injunction and ejectment. The first remedy is the more usual, however, and the other two are used merely to force the railroad to validly condemn the property.⁴ Most states provide a method by which the value of the land taken under condemnation proceedings may be ascertained, and where this remedy of the landowner is adequate, it is exclusive.⁵ The damages allowed are usually for the value of the land, and though title to improvements made by a trespasser vest in the owner of the land at common law, improvements made by a railroad company are an exception to this rule, and hence should not be considered in determining the value of the land.⁶

If the landowner does not consent to the railroad's occupation of his land, the above remedies are all available to him;⁷ but when he fails to object for a long time or does acts amounting to acquiescence in the railroad's entry, he is estopped to enjoin the railroad or to maintain an action of ejectment, and can only sue to recover the damages occasioned by the taking.⁸ The courts are far more willing to recognize the landowner's right before the railroad has begun operation, and hence has not become affected with a public interest, than afterwards; for if just compensation be made, there can be no need of allowing the interest of the public to be affected by granting ejectment or injunction, when the railroad can usually acquire the land by subsequent condemnation proceedings.⁹

If the land in controversy has been validly condemned, but after the railroad has been in operation for some time, the original owner objects to the occupation of a portion of the land, upon the ground that it is not necessary for railroad purposes and therefore not

⁴ *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *Jones v. New Orleans, etc., R. Co.*, 70 Ala. 227; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538. In *Evans v. Missouri, etc., R. Co.*, 64 Mo. 453, where the point was raised that, the railroad being in operation, the interest of the public required that it be not interfered with by injunction or ejectment, the court said, "This position is taken with very poor grace by a corporation, which, under the arbitrary forms of law, has wrested property from its owner. * * * That mythical personage, '*The Public*,' so often summoned as a convenient accessory when some flagrant wrong upon constitutional rights is in contemplation, can only 'acquire rights' in the land even of the humblest citizen by paying therefor. The plaintiff not being guilty of laches, and not having waived or postponed his claim, his right to pay for his property as a constitutional condition precedent still exists in all its original vigor. And for the enforcement of this right equity will fully supply a remedy, and such a remedy as will fully meet the exigencies of the case."

⁵ *Evans v. Missouri, etc., R. Co.*, *supra*; *Daniels v. Chicago & N. W. R. Co.*, *supra*.

⁶ *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 South. 150, 27 Am. & Eng. R. Cas. (N. S.) 469; *Justice v. Nusquehoning Valley R. Co.*, 87 Pa. St. 28.

⁷ *Evans v. Missouri, etc., R. Co.*, *supra*; *Southern Ry. Co. v. Hood*, 126 Ala. 312, 28 South. 662, 19 Am. & Eng. R. Cas. (N. S.) 166.

⁸ *Evans v. Missouri, etc., R. Co.*, *supra*; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1.

⁹ *Harrington v. St. Paul S. C. R. Co.*, *supra*.

held validly under the statute, and attempts to recover the land improperly used, his chances of recovery are greatly decreased by reason of the delinquent assertion of his rights. The opinion of the directors of the railroad as to what is necessary is very strong evidence and will not be disregarded by the courts unless clearly beyond any just necessity.¹⁰ In a recent case, a bill to quiet title was instituted to determine how much of the land condemned was necessary to the purposes of the railroad, and, though it was intimated by the court that such a bill would lie to determine how much the railroad was using for its purposes, such a remedy was denied in determining whether the property actually in use was needed for railroad purposes.¹¹

Some courts hold that whenever a railroad exceeds its powers and acquires land not needed for the operation of the road, it becomes a trespasser, just as would an individual, and may be ousted by ejectment.¹² The other view seems to be that after the railroad has condemned the property and paid for it the original owner can not question the necessity for the use of the land, but that such a misuse of power can only be objected to by the state, in direct proceedings.¹³

¹⁰ *Hill v. Western Vt. R. Co.*, 32 Vt. 68; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137.

¹¹ *Ennis-Brown Co. v. Central Pac. Ry. Co.*, 228 Fed. 46, affirmed, 235 Fed. 825; *Stuart v. Union Pac. R. Co.*, 178 Fed. 753.

¹² *Proprietors of Locks v. Nashua & L. R. Co.*, 104 Mass. 1, 6 Am. Rep. 181; *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. Co. v. Davis*, *supra*.

¹³ *Hamilton v. Annapolis, etc., R. Co.*, 1 Md. Ch. 107; *Pierce v. Boston & L. R. Co.*, 141 Mass. 481, 6 N. E. 96.